

# THREE DISPUTES AND THREE OBJECTIVES

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## China and the South China Sea

*Peter Dutton*

**T**he recent heightening of the competition between China and its neighbors over sovereignty, resources, and security in the South China Sea has drawn the attention of diplomatic and military leaders from many countries that seek to promote stability and security in these globally important waters. For states that ring the South China Sea, its waters represent a zone of rich hydrocarbon and protein resources that are increasingly dear on land as populations exhaust their territories' ability to meet their increasing needs. This resource competition alone could be the basis of sharp-edged disputes between the claimants. However, the South China Sea also represents the projection of the cultural consciousness of the centuries-long relationship that each coastal nation has had with its adjoining seas. This fact fuels competing modern-day nationalist tendencies among claimant-state populations, tendencies that in turn magnify the importance of the disputes and, during times of crisis, narrow the options for quiet negotiation or de-escalation.

As American leaders discuss policies and strategies in support of regional stability, some have described the complex disputes in the South China Sea as essentially a tangled knot of intractable challenges. Actually, however, there are three severable categories of disputes, each with its own parties, rule sets, and

politics. There are disputes over territorial sovereignty, in the overlapping claims to the South China Sea's islands, rocks, and reefs; disputes over which coastal states claim rightful jurisdiction over waters and seabed; and disputes over the proper balance of coastal-state and international rights to use the seas

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for military purposes. Unfortunately, the region's states are currently pursuing win-lose solutions to all three of these disputes. A careful analysis of the nature of each dispute reveals, instead, opportunities for more productive pathways to resolution achieved through win-win problem solving and recognition of the mutuality and commonality of interests in these globally important waters.

### THREE DISPUTES

The disputes in these three categories have resulted in recurring flashes of tension and conflict for approximately forty years. Notable incidents over sovereignty include the Chinese attack on the forces of the Republic of Vietnam in the Paracel Islands in 1974, China's attack on Vietnamese forces near Fiery Cross Reef in 1988, and China's military ouster of Philippines forces from Mischief Reef in 1995. The overall result of this series of incidents was the coalescence of a unified Association of Southeast Asian Nations (ASEAN) political position in opposition to China's behavior. A politically unified ASEAN persuaded China to accept the 2002 ASEAN Declaration on the Conduct of Parties in the South China Sea to decrease tensions among neighbors. The declaration includes an agreement by all parties to "resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force."<sup>1</sup> The Declaration of Conduct became the centerpiece of more than a decade of relative regional calm after 1995, the product of a Chinese shift in policy to pursue improved regional integration with its Southeast Asian neighbors through generous economic, commercial, infrastructural, and cultural programs. The United States repeatedly professed neutrality as to the outcome of the sovereignty and jurisdictional disagreements, as long as all parties continued to pursue peaceful means of resolution.

This stability was shattered by a series of antagonistic Chinese actions that began in 2007. A flare-up in tensions in the South China Sea began when China pressured Vietnam and several oil companies in connection with oil exploration and drilling off the Vietnamese coasts. As the U.S. Deputy Assistant Secretary of State, Scot Marciel, testified before the Senate Foreign Relations Committee in July 2009, "Starting in the summer of 2007, China told a number of U.S. and foreign oil and gas firms to stop exploration work with Vietnamese partners in the South China Sea or face unspecified consequences in their business dealings with China."<sup>2</sup> The Senate hearing was being held in the wake of the March 2009 *Impeccable* incident, which had awakened many in the United States to China's more assertive stance in the South China Sea. In that incident, an American naval research vessel was aggressively harassed approximately seventy nautical miles off Hainan Island by Chinese "fishermen" with the support of Chinese civilian law-enforcement vessels and under the observation of a People's Liberation Army Navy intelligence ship.<sup>3</sup>

These Chinese actions resulted in a return of tension to the region. In response to China's new strategy, Secretary of State Hillary Clinton stated at the ASEAN Regional Forum (ARF) in July 2010, "The United States, like every nation, has a national interest in freedom of navigation, open access to Asia's maritime commons, and respect for international law in the South China Sea. . . . The United States supports a collaborative diplomatic process by all claimants for resolving the various territorial disputes without coercion. . . . We encourage the parties to reach agreement on a full code of conduct."<sup>4</sup>

Until this time, the only attribute common to all South China Sea disputes had been that they involved China as a party. However, China's turn in 2009 toward an assertive, even aggressive approach—especially in its efforts to control U.S. naval activities in the South China Sea—resulted in new American attention to and interest in all three categories of disputes. In order to find a pathway to return to the desired state of regional stability, it is helpful to examine the attributes of each of the three types.

### *Sovereignty*

Disputes over sovereignty center on questions of which coastal states have the right to exercise the full measure of state authority over the physical territory of the islands in the South China Sea. They involve Vietnam, Malaysia, the Philippines, and perhaps Brunei, as well as China and Taiwan.<sup>5</sup> Vietnam claims "indisputable sovereignty" over all of the Spratly (Truong Sa) and Paracel (Hoang Sa) Islands;<sup>6</sup> one possible interpretation of some of its recent submissions to the United Nations (UN), however, is that it might be willing to relinquish its claims, at least as regards the Spratlys, in return for recognition of wider resource rights in the South China Sea.<sup>7</sup> Malaysia claims sovereignty over approximately twelve of the southernmost Spratly Islands, based on their situation on its claimed continental shelf. Likewise, Brunei appears to make a similar claim to sovereignty over Louisa Reef, on the basis of its location within its claimed exclusive economic zone. The Philippines claims sovereignty over many of the easternmost Spratly Islands, a cluster to which it refers as the Kalayaan Island Group.<sup>8</sup>

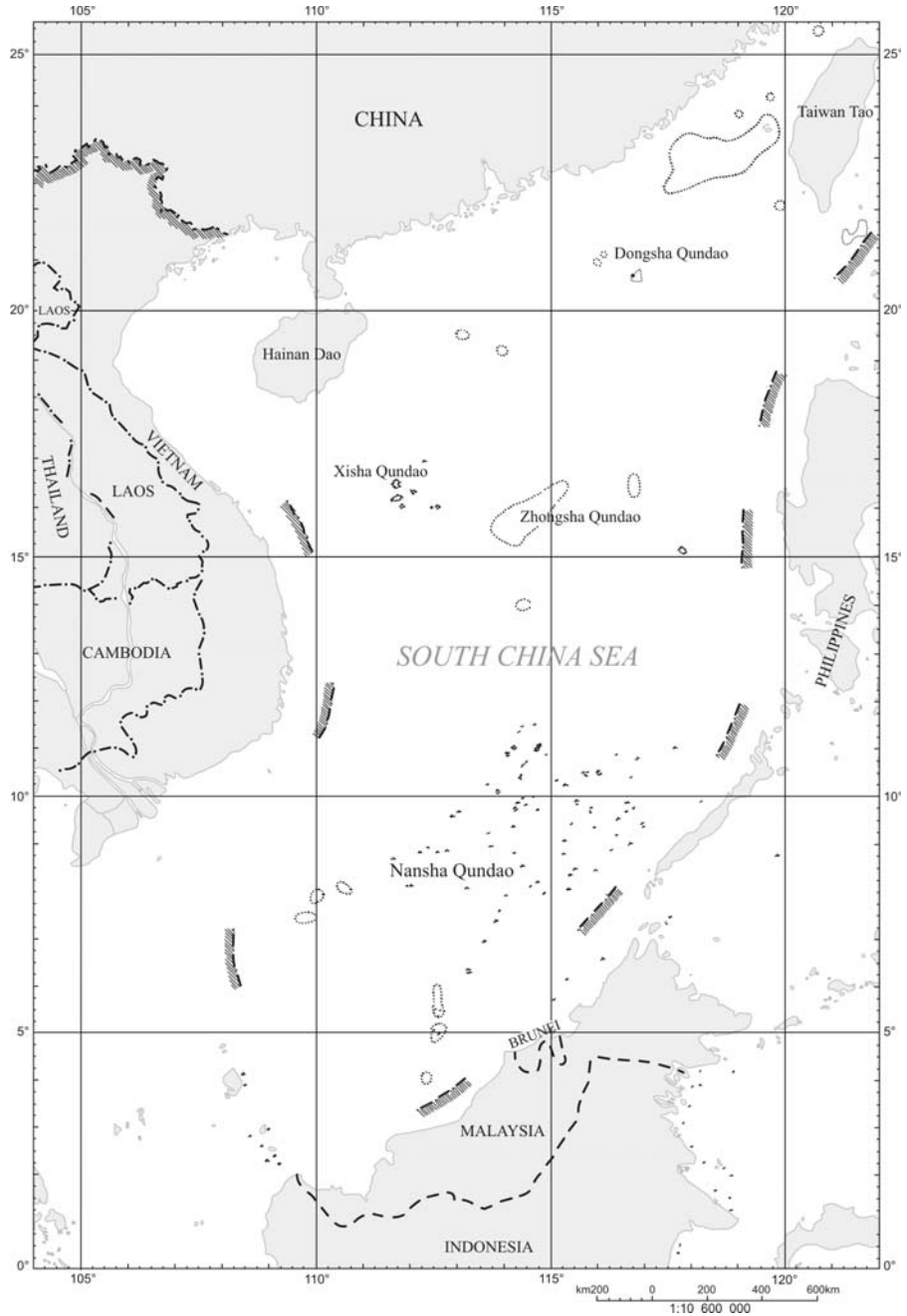
China and Taiwan maintain overlapping, related claims to all the islands in the South China Sea. In 1947 the Nationalist government of the Republic of China began to publish maps with a U-shaped series of lines in the South China Sea delineating its maritime boundaries (see map). These maps were based on a 1935 internal government report prepared to define the limits of China, many parts of which were dominated by outside powers at the time.<sup>9</sup> Though the exact nature of the claim was never specified by the Nationalist government, the cartographic feature persisted in maps published by the Communist Party after it came to power on the mainland in 1949, and today the U-shaped line's nine

dashes in the South China Sea remain on maps published both in China and on Taiwan.<sup>10</sup> In 1992, further clarifying its claims of sovereignty over all the islands in the South China Sea, the People's Republic of China enacted its Law on the Territorial Sea and Contiguous Zone, which specifies that China claims sovereignty over the features of all of the island groups that fall within the U-shaped line in the South China Sea: the Pratas Islands (Dongsha), the Paracel Islands (Xisha), Macclesfield Bank (Zhongsha), and the Spratly Islands (Nansha). The U-shaped line therefore represents one factor in understanding the competing claims to the numerous islands, shoals, rocks, and islets contained within its nine dashes.

The Chinese government appears to maintain a studied policy of ambiguity about the line's meaning. Among Chinese scholars and officials, however, there appear to be four dominant schools of thought—some related to sovereignty and others more relevant to China's jurisdictional claims (which will be analyzed below).

*Sovereign Waters.* The first approach taken by some Chinese policy analysts is that the expanse enclosed by the U-shaped line should be considered fully sovereign Chinese waters, subject to the complete measure of the government's authority, presumably as either internal waters or territorial seas. One group of senior Chinese defense analysts, for instance, describes the nation's offshore interests as "the area extending out from the Chinese mainland coastline between 200 nautical miles (to the east) and 1600 nautical miles (to the south)," or roughly to four degrees north latitude as claimed in the 1935 report. They consider these "sea domains under Chinese jurisdiction . . . [as] the overlaying area of China's national sovereignty."<sup>11</sup> Another researcher refers to "China's debates with neighboring countries over China's maritime sovereignty" in advising that the correct strategy is for China "to struggle rather than to fight."<sup>12</sup> It has been easy for some to dismiss this perspective as based on mistranslation or the failure of nonspecialists to appreciate the distinction between sovereignty, sovereign rights, and jurisdiction. However, experienced Chinese legal specialists have specifically used the term "sovereignty" in presentations about China's claims in the South China Sea delivered to legal practitioners of other nations in international forums.<sup>13</sup> The concept that China exercises full sovereignty over all the waters embraced by the U-shaped line is also implicit in the description by at least one military scholar of the seas surrounding China's shores as "China's 'blue-colored land'" and as a region "owned" by China.<sup>14</sup>

*Historic Waters.* Some Chinese have suggested that the concept of "historic waters" enables the government legitimately to claim broad control over the South China Sea.<sup>15</sup> The concept, a variation on China's claim of sovereignty in the



The U-shaped line formed by the nine dashes reflects China's claim over the waters and islands of the South China Sea. Three types of legal disputes arise from the claim: sovereignty disputes related to the island features, disputes over resource jurisdiction in the surrounding waters, and disputes over the extent of coastal-state authority to prohibit foreign military activities. (United Nations, [www.un.org](http://www.un.org).)

South China Sea, reflects the view held by many Chinese academics and policy makers that the nine-dash line represents a claim to historic waters, historic “title,” or at least some kind of exclusive rights to administer the waters and territory within the line’s boundaries.<sup>16</sup> Perhaps the most authoritative statement of

international law on the point was issued in 1951 by the International Court of Justice in the *Fisheries Case*, in which the United Kingdom challenged before the International Court of Justice a claim by Norway to sovereignty over waters along its craggy coastline beyond the traditional three-mile territorial-sea limit of the time.<sup>17</sup>

The court considered three relevant factors. The first was the close geographical dependence of the territorial sea upon the land domain—the relevant portions of the Norwegian coastline being deeply indented, with complex geographic features and an estimated 120,000 minor islands, islets, rocks, and shoals. The second factor was the presence or absence of links between the land formations and the sea space sufficiently close to make the region susceptible to a fully sovereign regime of governance. Finally, it considered unique economic interests belonging to the coastal state as clearly evidenced by long usage. Ultimately the court approved Norway's extension, based on its historic claims, of sovereignty over the sea areas and the features contained within them.

The requirements laid out in the *Fisheries Case* for an extension by a coastal state of sovereignty over water space do not lend support to China's claim. In particular, there is no close geographical dependence between the sea and the land in this region. Indeed, the land features are so insignificant that they have long been seen more as navigational hazards than as productive territory. Additionally, the islets themselves are more widely dispersed than are the features along the Norwegian coastline. The merely sporadic presence of fishermen and traders and the lack of freshwater and arable land to support an indigenous population in any case strongly suggest that the region is not susceptible to a fully sovereign regime of governance. Accordingly, China's claim of historic waters has weak support on these bases.

Concerning the question of unique economic interests, China has had well documented contact with the islands of the South China Sea for many centuries through fishermen, traders, and the occasional government official. But the historical record reflects similarly well documented contact by Vietnam. Neither country has a record of sustained, exclusive use of or reliance upon the resources of the South China Sea. The peoples of the Philippines, Malaysia, and Indonesia have also maintained contact with these islands, in support of traditional fishing and local trade. Thus, no evidence points to unique economic interests of China or any other single country in or around the islands of the South China Sea. Rather the evidence suggests the contrary—that the waters of the South China Sea and their sparse islands, islets, rocks, and reefs have for many centuries been the common fishing grounds and trading routes of all regional peoples. Indeed, this long-standing common usage suggests that far from having been supervised as any party's zone of sovereignty, the South China Sea developed as a sort of

regional common in which all parties pursued their interests without fear of molestation by the authorities of other coastal states.

***Island Claims.*** Some Chinese academics and policy makers view the U-shaped line as asserting a claim to sovereignty over all the islands, rocks, sandbars, coral heads, and other land features that pierce the waters of the South China Sea, as well as to whatever jurisdiction international law of the sea allows coastal states based on sovereignty over these small bits of land.<sup>18</sup> On its face at least, a Chinese claim to sovereignty over the islands and to jurisdiction lawfully derived from it is legitimate, in that it complies with the general provisions of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and other aspects of law of the sea. However, a series of fundamental problems undermine it, including the fact that Vietnam, Malaysia, the Philippines, and Taiwan all maintain claims to sovereignty over some or all of the islands in the South China Sea. Since the 1995 Mischief Reef incident between China and the Philippines, a certain stability has been achieved since the five claimants that occupy certain features have agreed to maintain the status quo.

China, of course, occupies and administers all of the Paracels, though Vietnam still maintains its claim to sovereignty over them. The Spratlys represent a mixed case. Since 1996, Vietnam has occupied or controlled approximately twenty-two features, China roughly ten features, the Philippines eight, Malaysia four, and Taiwan one.<sup>19</sup> In order to support a claim of sovereignty over an island, international law requires that a coastal state demonstrate effective occupation or continuous administration and control.<sup>20</sup> Accordingly, China's claim to those of the Spratly Islands that it does not occupy or effectively administer or control is unsupported by international law. The same is true of the claims of any other parties that do not actually occupy features over which they claim sovereignty. Some observers wrongly conclude that the non-Chinese claims are based solely on European claims from the colonial era. In fact, those of Southeast Asian states are at least in part expressions of the contacts all coastal peoples have had with the South China Sea's islands and waters for many centuries and of national consciousness that international law should protect those interests.

***Security Interests.*** Finally, a fourth Chinese perspective is that the U-shaped line reflects China's long-standing maritime security interests in the South China Sea and that these security interests should have legal protection. The Chinese have long viewed the Bohai Gulf, the Yellow Sea, the East China Sea, and the South China Sea—the “near seas”—as regions of core geostrategic interest and as parts of a great defensive perimeter established on land and at sea to protect China's major population and economic centers along the coasts. As one



People's Liberation Army (PLA) major general recently put it, the South China Sea constitutes part of China's maritime "strategic stability belt."<sup>21</sup>

China's assertiveness about its claims in the waters of its near seas has grown in tandem with the size of its navy and maritime services. As one Chinese analyst put it, "The Navy is just one of the means of protecting our maritime rights and interests[;] . . . the primary means should be to rely on the law, on international law and internal legislation." To enforce these laws and sovereign interests at sea, "in recent years we have started to carry out periodic patrols to safeguard our rights in the East and South China Seas."<sup>22</sup> Thus, some Chinese see international law, in conjunction with their developing maritime power, as a means to establish the long-desired maritime security buffer throughout the near seas, including the South China Sea. That international law does not provide protection for a coastal state's security interests beyond the narrow territorial sea has not deterred Chinese proponents from seeking to change those norms.

### *Jurisdiction*

A second category of disputes involves the delimitation of jurisdictional boundaries between neighboring sea zones, including exclusive economic zones (EEZs) and continental shelves. China complicates these disputes through its ambiguous claims of authority over the water space within the nine-dash line, but it is clear that the claim encompasses aspects of jurisdiction as well as aspects of sovereignty.<sup>23</sup> "Jurisdiction" under international law is something less than full sovereignty, in that it does not include the same degree of absolute and exclusive authority to govern all matters of interest to the state. Like sovereignty, jurisdiction is a reflection of *state power* within *specified boundaries*, but the concept of jurisdiction connotes the application of state authority only over *a limited, specified set of subject matters*. All the disputants involved in the question of sovereignty are also involved in the jurisdictional disputes, plus Indonesia, which has an EEZ claim extending from Natuna Island that overlaps with China's nine-dash line.<sup>24</sup>

The two main sources of jurisdictional disputes in the South China Sea are the boundaries of the various national EEZs and continental-shelf zones over which each state may exercise its authority. Within the geographic limits outlined in UNCLOS article 76 (specified boundaries), coastal states are afforded exclusive authority (state power) to regulate the exploration and exploitation of the resources of the seabed, although the legal character of the water space above the continental shelf remains unchanged (a limited, specified set of subject matters). Thus, international law provides for limited coastal-state jurisdiction within a specified zone known as the continental shelf.

Similarly, one of the key innovations of UNCLOS was that it specified coastal-state authority in the water space beyond the territorial sea, a concept that had been steadily developing over the course of the twentieth century. UNCLOS Part V established coastal-state jurisdiction over a vast littoral swath of water space known as the EEZ, which may extend to two hundred nautical miles from the coastal state's baselines (specified coastal boundaries), and in which the coastal state has "sovereign rights" to the resources plus related jurisdictional authorities (exclusive state power over the specified resource-related matters), for the purpose of managing those resources. Thus, UNCLOS completed the creation of jurisdictional regimes over resources in littoral waters. Accordingly, this second category of disputes is at its core a disagreement over jurisdictional authority in the South China Sea to explore and exploit the resources on and under the sea's continental shelf and in its water column.

*China's Ambiguous Jurisdictional Claims.* All states with coastlines that border the South China Sea claim continental shelves and EEZs; however, very little actual delimitation of the boundaries between coastal-state zones has occurred.<sup>25</sup> China's nine-dash-line claim presents a particular problem for resolving these disputes, because in addition to relying on the line as a source of sovereignty, Chinese policy makers also refer to it as the basis for China's South China Sea jurisdictional claims. As noted above, some Chinese scholars and policy makers assert that the concept of historic rights (as an alternative to, or in addition to, China's claim to historic waters in the South China Sea) applies as a basis for jurisdictional control over water space within the nine-dash line. The concept of historic waters has only the briefest mention in UNCLOS, but it exists in customary international law related to bays. It allows coastal states to claim extended jurisdiction over water space or islands when their claims have been open and long-standing, exclusive, and widely accepted by other states.

China's claim to a historic right to jurisdiction over the waters of the South China Sea is seriously undermined by similar, overlapping claims maintained by the Philippines, Vietnam, Malaysia, Brunei, and Indonesia, not to mention parallel claims made separately by Taiwan. This demonstrates that however long-standing China's claims of jurisdiction in the South China Sea may be, clearly they are not exclusive or widely accepted by other states. Nonetheless, Chinese law asserts historic rights as a basis for jurisdiction over the South China Sea. The 1998 Law of the People's Republic of China on the Exclusive Economic Zone and Continental Shelf claims an exclusive economic zone emanating from all Chinese territory, which would logically mean all relevant Chinese territory as specified in the 1992 Territorial Sea Law, which in turn, as noted above, specifically includes each of the island groups in the South China Sea. Thus, in combination,

these two Chinese laws assert an EEZ and therefore jurisdictional control over nearly the entire South China Sea area within the U-shaped line.

This impression was reinforced in April 2011 when China submitted a *note verbale* to the Commission on the Limits of the Continental Shelf, formed under the terms of UNCLOS.<sup>26</sup> Ostensibly, China's note protested a Philippines submission that had asserted jurisdiction in the waters surrounding the Kalayaan Islands (i.e., the Philippine-claimed group of Spratly Islands).<sup>27</sup> However, these submissions both join a lengthening portfolio of legal briefs submitted by the various claimants to clarify and justify their various South China Sea claims.<sup>28</sup> China's note stated, "Under the relevant provisions of the 1982 UNCLOS, as well as the Law of the People's Republic of China on Territorial Sea and Contiguous Zone (1992) and the Law on the Exclusive Economic Zone and the Continental Shelf of the PROC (1998), China's Nansha Islands is [*sic*] fully entitled to Territorial Sea, EEZ and Continental Shelf." Given that the domestic laws referred to in China's note specifically assert additional "historic rights" that are not relinquished by China's creation of an EEZ or continental shelf, the *note verbale* does little to clarify the ambiguity with which China has so carefully cloaked its claims, since such historic rights continue to leave room to assert legal protection for maritime sovereignty or security interests.

In addition to its ambiguity and lack of specificity, there are many other problems with China's approach to jurisdiction in the South China Sea. For instance, only a very few of the South China Sea's islands qualify under UNCLOS for more than the mere twelve-nautical-mile territorial sea. Article 121 requires that islands support human habitation or economic activity before they can accrue a full two-hundred-mile exclusive economic zone or continental shelf. Smaller islands, referred to as "rocks," accrue no more than a twelve-mile territorial sea. Virtually all of the features in the Spratly Islands group clearly fall into the latter category. Another weakness of China's claim of jurisdiction over the South China Sea based on its assertion of sovereignty over the sea's rocks and sandbars is that it has objected to similar claims made by Japan to an exclusive economic zone and continental-shelf rights around Okinotorishima, a small coral feature in the Pacific Ocean about 1,050 nautical miles south of Tokyo.<sup>29</sup> International law prevents a state from claiming legal rights if it objects to the same type of claims by other states. Accordingly, neither the provisions of UNCLOS nor historic rights are especially persuasive sources of law on which China can base its claims.

***Jurisdictional Claims by Other States.*** The jurisdictional claims of Vietnam and Malaysia conform much more closely than China's assertions to international law. Vietnam, for instance, claims an exclusive economic zone that "is adjacent

to the Vietnamese territorial sea and forms with it a 200-nautical-mile zone from the baseline used to measure the breadth of Viet Nam's territorial sea."<sup>30</sup> In addition to clarity about the boundaries of its claim, Vietnam also specifies the extent of its national jurisdiction.<sup>31</sup> Vietnam's jurisdictional claims track nearly word for word with the requirements of UNCLOS articles 57 and 56, respectively, although it should be noted that Vietnam's baselines are considered by the U.S. State Department to be excessive.<sup>32</sup>

Malaysia's Exclusive Economic Zone Act 1984 make similarly normative EEZ and continental-shelf claims.<sup>33</sup> Additionally, the Joint Submission of Malaysia and Vietnam to the Commission on the Limits of the Continental Shelf makes a reasonable claim to an extended continental shelf beyond the two-hundred-nautical-mile EEZ in accordance with UNCLOS article 76.<sup>34</sup> The submission starts with each coastal state's baselines and measures two hundred nautical miles without regard to any island features. Concerning the Spratly Islands, the legal approach taken by Vietnam and Malaysia, in contrast with the various Chinese approaches, complies with UNCLOS article 121 concerning the regime of islands and with recent case law. Specifically, the Malaysia-Vietnam approach recognizes that the various islets, reefs, and shoals in the southern part of the South China Sea are too small to form the basis of a claim to an EEZ or a continental shelf (or any other form of jurisdiction other than a territorial sea) of their own right.

Another important aspect of Malaysia's and Vietnam's claims is that they are specific and public. They represent a choice made by each government concerning how international law should be interpreted in regard to its jurisdiction over offshore zones. They provide a basis for discussion, negotiation, and even potentially litigation by other states that have different perspectives. They do not rely on power—military or economic—to decide the issue. In these ways, the Malaysia-Vietnam approach provides a basis for a stable resolution to any disputes, which is the point of the comment by the International Court of Justice in the *Fisheries Case* discussed above.

The government of the Philippines established archipelagic baselines for its main islands in legislation completed in 2009 and filed on deposit with the UN.<sup>35</sup> This legislation also claims a separate, nonspecific regime of islands for its Kalayaan Islands claims and its separate claim to the Scarborough Shoal. The Philippines also maintains an EEZ claim based on a 1978 presidential proclamation.<sup>36</sup> The Philippines EEZ extends two hundred nautical miles from its baselines, which were publicly established by the 2009 legislation. Thus, with regard to its main islands, the Philippines made a specific and public claim concerning the extent of its EEZ.

Concerning its continental-shelf claim, the Philippines retains on file with the UN its Presidential Proclamation of 1968, which claims a continental shelf “to where the depth of the [Philippines] superjacent waters admits of the exploitation of such resources, including living organisms belonging to sedentary species.”<sup>37</sup> This outdated expression of the jurisdictional limits of the Philippines continental-shelf claim stems from the definition that appeared in the 1958 Continental Shelf Convention, the provisions of which were updated by UNCLOS article 76.<sup>38</sup> Additionally, the Philippines made a claim to an extended continental shelf in the Philippine Sea, but not in the South China Sea. The Philippines could improve the clarity of its jurisdictional claims to a continental shelf by bringing its proclamation into alignment with UNCLOS. Additionally, the government of the Philippines should publicly state what, if any, claims to jurisdiction over maritime zones it maintains, based on its claim of sovereignty over some of the Spratly Islands and Scarborough Reef. These steps would promote stability by removing sources of ambiguity and allowing for negotiations or arbitration in concert with international law.

In sum, the jurisdictional claims of Malaysia and Vietnam are fully public and stated with specificity. The claims of the Philippines are improving in clarity, but there continues to be room for improvement in that regard. The claims of Brunei should be made more publicly accessible by placing them on deposit with the UN. The jurisdictional claims of China (and Taiwan) in the South China Sea, however, remain ambiguous and therefore contribute to regional instability and present problems for all states whose vessels operate in the South China Sea.

### *Control*

The third category of disputes relates to attempts to assert coastal-state control over the activities of military vessels operating in the South China Sea and is fundamentally about the correct interpretation of international law concerning the balance of coastal-state and international rights and obligations in the EEZ and other jurisdictional waters. As a practical matter there are only two parties to the dispute in this category, China and the United States. Many other countries around the globe, however, have interests and stakes in its outcome, since this category involves China’s various attempts to alter international norms concerning freedom of navigation for military purposes and to roll back the balance of coastal-state and international rights in coastal zones that were negotiated in the development of UNCLOS. This resulted in a series of confrontations between American and Chinese government vessels in the South China Sea between 2001 and 2009 that, although tension producing, were manageable from a political and military perspective.<sup>39</sup> China ended this mutual policy of “managed

friction,” however, on 8 March 2009, when it confronted USNS *Impeccable* (T-AGOS 23) with five vessels—a PLA Navy intelligence ship, a government fisheries patrol vessel, a maritime surveillance service vessel of the State Oceanographic Administration, and two small fishing trawlers.<sup>40</sup>

Under the observation of all three Chinese government vessels, the fishing trawlers maneuvered dangerously to within eight meters ahead of *Impeccable* and then abruptly stopped. This forced *Impeccable* to take emergency action to avoid a collision. Additionally, the Chinese aboard the fishing trawlers used a grappling hook to try to snag *Impeccable*’s towed cable and its related acoustic equipment.<sup>41</sup> These Chinese actions violated international norms related to the duty to exercise due regard in navigation of vessels at sea and also constituted unlawful interference with a sovereign vessel of another state. *Impeccable* left the scene in order to reduce immediate tensions but returned to the exact location several days later in the company of an American warship, USS *Chung Hoon* (DDG 93).<sup>42</sup> Thus, the Chinese escalation from past patterns raised the dispute over navigation issues from “managed friction” to one of “near conflict,” thereby initiating renewed American strategic attention to the waters of the South China Sea and to the international norms governing freedom of navigation for military purposes in the EEZ.

The creation of the exclusive economic zone in 1982 by UNCLOS as a region extending beyond the territorial sea to a maximum of two hundred nautical miles from a coastal state’s shores was a carefully balanced compromise between the interests of coastal states in managing and protecting ocean resources and those of maritime user states in ensuring high-seas freedoms of navigation and overflight, including for military purposes. Thus while in the exclusive economic zone the coastal state was granted sovereign rights to resources and jurisdiction to make laws related to those resources, high-seas freedoms of navigation were specifically preserved for all states, to ensure the participation of maritime powers in the convention.

Nonetheless, China has persistently attempted to shift this carefully balanced compromise by making more expansive claims of legal protection for its security interests, especially in the South China Sea. For instance, one statement by a Chinese military spokesman concerning international freedoms of navigation in the South China Sea is typical. A Chinese Defense Ministry spokesman, Senior Colonel Geng Yansheng, stated, “We will, in accordance with the demands of international law, respect the freedom of *passage* of ships or aircraft from relevant countries which are in compliance with international law.”<sup>43</sup> When pressed to explain the distinction between “passage” and “navigation,” other senior Chinese officials have stated that the Chinese government has not objected to the passing

of U.S. Navy vessels through the Chinese EEZ en route to another destination. However, when such vessels conduct exercises, gather intelligence or other militarily useful data, or undertake activities other than mere passage, these officials argue, they are in violation of international and Chinese domestic law.<sup>44</sup>

Secretary Clinton, however, made clear at the ASEAN Regional Forum in July 2010 that in the South China Sea the United States will not accept China's limitations on freedoms of navigation for military purposes. She stated that the United States, like all nations, has "a national interest in freedom of navigation, open access to Asia's maritime commons, and respect for international law in the South China Sea."<sup>45</sup>

### THREE OBJECTIVES

China is pursuing three main objectives in the South China Sea and Southeast Asia: regional integration, resource control, and enhanced security. Chinese actions over the past four decades are better understood in relation to its various strategies for achieving these objectives.

#### *Regional Integration*

Regional integration between China and the states of Southeast Asia is a priority for China, as part of its overall policy of "Peaceful Rise."<sup>46</sup> Regional integration with other South China Sea states, therefore, has both political and economic aspects. To achieve growth, it is helpful for a state to have peaceful borders so that resources can be channeled into economic development rather than armies and border defense systems.<sup>47</sup> Accordingly, in order to focus domestic energy on its rapid economic rise, China entered into a period of "strategic pause" with respect to physical confrontation over the Spratly Islands beginning in the mid-1990s and after the political setbacks China suffered in connection with the Mischief Reef incident. This new strategy, pursued from the late 1990s until at least 2007, resulted in major progress, in that opportunities for regional political and economic integration with China were largely welcomed by Southeast Asian states as promoting region-wide economic growth and counterbalancing other outside powers, such as the United States.

In order to facilitate the political aspects of regional integration, China undertook numerous political relationships with ASEAN. Perhaps the most successful aspects of China's pursuit of regional integration, however, were the programs of economic, commercial, and infrastructural development. Two-way trade, for instance, soared from less than eight billion dollars in 1991 to \$106 billion in 2004 and to \$231 billion in 2008. The last figure is higher than the trade between ASEAN states and the United States for the same year, which amounted to \$172 billion. For many years, ASEAN enjoyed a trade surplus with China; that



has slipped in recent years, and to compensate, China has agreed to increase its bilateral investment in the region by 60 percent over two years.

Additionally, China has supported major infrastructure projects in the region. One such project, the Nanning–Singapore economic corridor, focuses on the construction of an integrated railway transportation system that links Nanning, Hanoi, Ho Chi Minh City, Phnom Penh, Bangkok, Kuala Lumpur, and Singapore. A second project, the Greater Mekong Subregion, similarly links Kunming, in China’s Yunnan Province, with Singapore via high-speed rail. More difficult for China to achieve are Pan Beibu Gulf development and the Hainan Initiative. These programs face the obvious challenge of dealing with areas in which sovereignty and jurisdiction remain in dispute.

Some commentators suggest that China’s many initiatives in support of regional integration reflect a “ripe fruit” strategy in which time is on China’s side. According to this line of thinking, regional integration efforts were designed to freeze the disputes and create favorable regional political conditions while China increased its economic and military power. In this view, once a high level of comparative development is achieved, “if . . . [China] continues to press its expansive claims in the South China Sea aggressively, the islands and their attendant maritime space may simply fall into its hands like ripe fruit. At the least, [China] will dominate the issue and obtain the lion’s share of any settlement.”<sup>48</sup>

Some Chinese believe that the aims of China’s substantial investment in Southeast Asia and of its policy of freezing disputes were to earn gratitude, or perhaps leverage, that would result in willing abandonment, in China’s favor, of South China Sea claims by other states. Recent events, however, suggest that Southeast Asian states prefer that no major power, including China, gain too much influence in the region. Thus, in a pendulum swing opposite to the one in the 1990s that led ASEAN states to welcome greater Chinese regional involvement, Southeast Asian states now invite the attention of outside powers, including the United States, to offset China’s present rising regional influence, in part to ensure that negotiations over South China Sea disputes proceed on a reasonably equal footing.

### *Resource Control*

In addition to regional integration, China is also pursuing the objective of enhancing its long-term resource security by ensuring its control over most of the South China Sea’s living and nonliving resources.<sup>49</sup> As one Chinese commentator stated, “What is the major challenge now confronting our nation? It is the question of resources.”<sup>50</sup> Zhou Shouwei, vice president of the China National Offshore Oil Corporation, has stated, “Offshore and especially deep-water oil



and gas discoveries have great significance for replenishing China's and the world's oil resources."<sup>51</sup>

Fishing resources are also important to the Chinese leadership. One government publication states, "The . . . Sino-Vietnamese Northern Gulf Fishing Agreement has dramatically compressed the working space for our nation's fishermen. These new difficulties for our hard-pressed fleets undoubtedly constitute one disaster after another. Not only have [such agreements] worsened the situation, but there is also the possibility that it could touch off social instability in various coastal towns and villages."<sup>52</sup> Indeed, the Chinese navy sees the importance of sea power as an aspect of this resource security.

In the new century, the oceans are . . . strategic treasure troves of natural resources for the sustainable development of humankind. Humankind's full exploitation and utilization of the oceans and joint management of the oceans in keeping with the law is essentially a redistribution of the world's maritime rights and interests. Whoever has the greatest investment in the oceans, whoever has the greatest capacity for exploiting the oceans, and whoever controls the oceans will have the upper hand and will acquire more wealth from the oceans, and that nation will be rich and powerful. Therefore it is inevitable that the oceans will become an important arena for international political, economic, and military struggles as well as an important objective in the struggle of every nation for rights and interests.<sup>53</sup>

Perhaps this unidentified author's primary intention was to justify expansion of China's navy. However, that he chose to do so using arguments about resource insecurity and the importance of national control over maritime resources is an indication of anxiety among the Chinese people and leadership over the prospect of providing food and energy for more than 1.3 billion people, especially as expectations rise along with China's economic status. Thus, an important objective for China is to ensure its future access to the resources of the South China Sea.

### *Enhanced Security*

China's third objective appears to be to enhance its control over the South China Sea in order to create a maritime security buffer zone that protects the major population centers, industry, and rich cultural sites of China's developed eastern coastal area.

As a retired PLA major general has stated,

China's sea area is the initial strategic barrier for homeland security. The coastal area was the front line of growth during China's economic development and the development of Chinese civil society. China's most developed regions are along the coastline.

... The coastal area also possesses the largest population of any of the country's regions, the highest concentration of high-technology industries, and the most modernized culture. If coastal defense were to fall into danger, China's politically and economically important central regions would be exposed to external threats. In the context of modern warfare, military skills such as long-range precision strike develop gradually, which makes the coastal sea area more and more meaningful for homeland defense as a region providing strategic depth and precious early-warning time. In short, the coastal area is the gateway for China's entire national security.<sup>54</sup>

The idea that China needs to control its littoral maritime zones is based on the classic approach to geostrategy of a country having security concerns with regard to both land and sea. Such countries generally follow security strategies that balance land and maritime strength in order to develop concentric circles of strategic control, influence, and reach around their central regions of vital national interest.<sup>55</sup> Thus, the South China Sea, East China Sea, and Yellow Sea collectively represent an area in which Chinese strategists believe they need to develop military control in order to exclude external threats and thereby to raise the level of security of China's coastal region.<sup>56</sup>

However, China's recent actions to enhance its security by competing with other claimants for sovereignty, jurisdiction, and control over the South China Sea fail to account for the interests of other states. Thus, beginning in March 2009, when China shifted its regional strategy away from integration and resource cooperation toward competition over sovereignty and security, it allowed the "ripened fruit," the political benefits, gained by more than a decade of cooperation to rot on the vine unharvested. Chinese policy makers would do well to remember that regional integration, resource control, and enhanced security are the shared objectives of all regional states and that in the past cooperation has produced substantial results that the recent turn to competition is unlikely to duplicate. Win-win solutions that focus on mutual interests are more promising than win-lose solutions based on competition for sovereignty, jurisdiction, and control.

## NEW THINKING ABOUT AN OLD PROBLEM

It is striking how much the South China Sea interests of China and its Southeast Asian neighbors overlap. Regional political and economic integration has greatly benefited each of them. Each has an interest in sustainable development of the South China Sea's rich fisheries and other living resources. Each has a growing economy and a similarly growing demand for hydrocarbons to support it. The national security of each depends in part on the security of the waters off its shores. What is also striking, however, is that one of the primary reasons for

the failure to resolve the disputes is that the chosen mechanisms for resolution are all win-lose—that is, exclusive state sovereignty and jurisdiction allow for only one winner and create many losers.

Because the islands and reefs of the South China Sea were for many centuries open to fishermen and traders of all coastal peoples—Vietnamese, Chinese, Malay, and Filipinos alike—each nation developed a connection to and an interest in these islands. Similarly, for many centuries the rich fishing grounds were open to all without fear of exclusion or dominance by others. The present competition for exclusive sovereignty over the islands and for jurisdiction over the resources is shortsighted and self-referential, and it fails to account for the mutuality of the interests at stake. This type of conflict resolution, in fact, fails to resolve anything—losers of one round become incentivized to begin a new campaign to reverse or compensate for their loss. In Asia, where memories are long, a win-lose dynamic would essentially institutionalize tensions rather than reducing them permanently.

Some in China seem to recognize this reality. One Chinese commentator has observed that “as China’s comprehensive national strength has increased along with its military capabilities and its requirements for energy resources, so ASEAN states’ anxiety about a China threat has been increasing by the day since independently they have no prospect to balance against China. . . . [Thus, they have taken steps to] unite together in order to cope with China.”<sup>57</sup> Because it helps overcome the perception that growing Chinese strength is a danger to its neighbors’ interests, this author praises the benefits of joint development. Others are less sanguine. As one military scholar put it, “China’s policy toward the South China Sea is ‘sovereignty is ours, set aside disputes, pursue joint development.’ But ‘setting aside disputes’ does not mean setting aside our sovereignty. . . . China is already not a weak country. . . . [I]t is hoped that related countries will not make a strategic miscalculation.”<sup>58</sup>

Although in China there is a rich and varied debate about how best to pursue the nation’s interests in the South China Sea, there is a common center to the range of Chinese perspectives.<sup>59</sup> All reflect dissatisfaction with the status quo, in which the Chinese perceive that only China is exercising restraint while all other claimants actively develop and exploit the resources in the disputed zones. There is also general recognition that China has few good options for protecting its interests. Finally, there is general agreement that militarization would only aggravate the disputes and that improving and energizing China’s civilian enforcement capabilities can best protect Chinese interests.

Thus, there is a kernel of hope that solutions to the Three Disputes can be found in win-win, interest-based approaches that accommodate all and exclude none.<sup>60</sup> A good place to begin would be meaningful implementation of the

principles of the Declaration on the Conduct of Parties in the South China Sea, which emphasize peaceful approaches to the many disputes that currently disturb regional tranquility.<sup>61</sup>

### *Win-Win Thinking about Sovereignty Disputes*

China's muscular insistence in the years between 1975 and 1995 on severing the sovereignty interests of other countries in the Paracel and Spratly Islands resulted only in a coalescence of political and military opinion in Southeast Asian states against China. Even China's policies of the past fifteen years of gaining political and economic rather than military leverage have failed, because they remained focused on obtaining exclusive Chinese domination of territories that China has never in its history fully controlled and in which all other peoples in the region were traditionally able to operate. The policy failed because it would have thwarted the interests of other states in the region to use the physical territory of the Spratly Islands to pursue commercial interests, research, enhanced regional and national security, and recreation. This situation suggests that past proposals for shared regional "ownership" of the islands should be revived.

One such proposal, originally made by Mark Valencia, Jon Van Dyke, and Noel Ludwig, was to establish a form of "regional sovereignty" over the islands themselves—that is to say, shared authority over the islands among regional states, to the exclusion of all others.<sup>62</sup> A regional authority established by agreement among the claimants could exercise this authority over the islands, their territorial seas, and sovereign airspace. Representation in the regional authority could take many forms but would be based on a combination of such factors as national population, length of coastline, and extent of current and historical usage—all of which are recognized in international case law as legitimate bases for resolving maritime disputes. This arrangement would allow all regional claimant-states to pursue their interests in the physical territory in the South China Sea through a political mechanism designed to manage the territory efficiently and effectively on behalf of them all.

A second approach that bears consideration is represented by Svalbard, between the north coast of Norway and Greenland. In order to resolve Svalbard's indeterminate status and to avoid international conflict over its resources, concerned states attending the Paris Conference in the aftermath of World War I negotiated the Treaty of Spitsbergen of 9 February 1920. The treaty gave primary sovereignty to Norway but allowed resource-related rights to all signatories. Original signatories included Australia, Canada, Denmark, France, Italy, Japan, Netherlands, Norway, Sweden, the United Kingdom, and the United States. The Soviet Union signed in 1924 and Germany in 1925; currently there are more than forty signatories, including China.<sup>63</sup> When the treaty came into force on 14

August 1925, Norway took over sovereignty, subject to rights of all parties to fish and hunt, to enjoy “equal liberty of access and entry for any reason, [and] to carry on there without impediment all maritime, industrial, mining and commercial operations on a footing of absolute equality.”<sup>64</sup> This creative approach to sovereignty, which accommodated the mutual interests of the various parties with the support of the international community, has contributed to regional security by avoiding conflict and effectively managing living and nonliving resources, and it has productively contributed to international scientific research. As such, it should be considered a potential model for a negotiated resolution of the disputes over the Spratly Islands.

### *Win-Win Thinking about Jurisdiction Disputes*

There are many examples of collaborative regimes to share jurisdiction over maritime resources that could be effectively applied in the South China Sea, including several in East and Southeast Asia. The joint Chinese-Vietnamese fishing zone in the Gulf of Tonkin/Beibu Gulf is one example of an approach to overlapping jurisdictional rights and accommodation of mutual, long-standing interests.<sup>65</sup> Useful elements of this agreement include delimited zones of national jurisdiction, a cooperative-management zone of mutual jurisdiction, and an agreement to cooperative management.<sup>66</sup>

Specifically, the agreement establishes a Joint Fishery Committee (JFC) that includes representatives from each party. Together they manage common functions, such as fisheries research, consultation with members of the fishing industry, and recommendations concerning catch quotas for the different types of species. The JFC is quite powerful, in that it has authority to take binding conservation and management measures in order to ensure that fish stocks do not become endangered through overfishing. Decisions are made on the basis of consensus, which promotes willing compliance among state parties. At annual meetings the JFC employs a “quantity-control approach” that sets a “total allowable catch” per species for each of several target species and specifies the number of vessels that may fish them. The total allowable catch is based on the status of each species, the extent of traditional fishing activity, and the impact of modern fishing and management techniques.<sup>67</sup>

A multilateral entity that could potentially serve as a model for the South China Sea is the Northwest Atlantic Fisheries Organization (NAFO). NAFO manages the high-seas fisheries in a rich fishing ground outside any EEZ in the northwestern Atlantic Ocean. NAFO’s “objective is to contribute through consultation and cooperation to the optimum utilization, rational management and conservation of the fishery resources of the Convention Area.”<sup>68</sup> The convention establishes a Fisheries Commission whose purpose is to achieve “optimum utilization of the fishery

resources” and to adopt a total annual catch quota based on the recommendations of a Scientific Council. The total annual catch quota, by species, is allocated by the commission among the members, giving special consideration to traditional fishing patterns and coastal communities whose livelihoods are based on resources from fishing regional waters.

The commission is also responsible for the adoption of “international methods of control and enforcement” by which member states may engage in mutual enforcement of quotas.<sup>69</sup> Mutual-enforcement measures include a mandatory vessel-monitoring system that uses satellite tracking to provide position updates every two hours; a mandatory observer program in which every vessel fishing in the regulatory area must carry an independent and impartial observer to report any infringements; and a joint inspection and surveillance scheme in which contracting parties have, in rotation, “inspection presence” responsibilities (currently Canada and the European Union) to monitor compliance by the vessels of all contracting parties and report apparent infringements of any vessel to its government for investigation and administrative or judicial action.<sup>70</sup> NAFO’s well developed scheme for multilateral accommodation of mutual fisheries interests and enforceability shows promise for fisheries cooperation in the South China Sea.

#### *Win-Win Thinking about Disputes Related to Military Activities*

There is at least some geostrategic rationale for Chinese antiaccess-oriented norms. China seeks to develop control over its near seas in order to enhance its own security and enjoy a freer hand in Asia to pursue its political objectives. However, China’s approach to the normative relationship between coastal states and foreign military power in the EEZ is shortsighted in that it focuses on China’s regional objectives, seemingly without regard to the importance of naval power to the security of sea-lanes around the globe. China relies for its economic growth and development on those very sea-lanes. Thus there appears to be a gap between China’s expression of antiaccess legal norms and its own global interests, since the logical result of a normative shift from international access to the EEZ toward coastal-state authority to exclude foreign military power would be an expanded zone of instability at sea and increased sanctuary for such destabilizing elements as piracy, human trafficking, and illegal weapons and narcotics trafficking.

It is Chinese pressure on the norms that govern military activities at sea that is now drawing the United States into disputes in the South China Sea in the first place. The United States has long withheld any opinion as to the ultimate disposition of questions of sovereignty and jurisdiction in the region. But freedom of navigation and the freedom to pursue traditionally lawful military activities at

sea are critical interests of the United States. Thus, at the 2010 ASEAN Regional Forum in Hanoi, the United States and ASEAN nations made it clear to China that its excessive claims in this regard are politically and legally unsustainable. Secretary Clinton took the opportunity to remind ARF attendees that freedom of navigation for all purposes, including for military activities, is a vital American national interest and is in the interest of all states that rely on open and secure sea-lanes—and indeed, “all” includes China.

During the tense ARF session in Hanoi, published reports pointed to another by-product of China’s policies—a desire, born of rising friction over South China Sea security issues, by many regional states for renewed American attention to regional security dynamics. As one Australian defense scholar stated, “All across the board, China is seeing the atmospherics change tremendously. . . . The idea of the China threat, thanks to its own efforts, is being revived.”<sup>71</sup> Unfortunately, the Chinese policy-making community currently seems unwilling or unable to accommodate the interests of either its regional neighbors or the United States, despite China’s pledge in the Declaration on the Conduct of Parties in the South China Sea to “respect . . . freedom of navigation in and overflight above the South China Sea as provided for by the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea.” This intractability reflects a national self-assertion that has only reaped instability. More traditional Chinese cultural thinking reflects elements of self-restraint and responsibility for others, especially those who are weaker, elements that appear to have been suppressed from the Chinese political body as present policies were made in 2009 and 2010.

Underlying the concern of other states about China’s behavior and international law perspectives is the question of what kind of major power China will become as it continues to rise. Will it use its increased power to achieve only its own interests, at the expense of the important interests of others? If so, this is a win-lose path that is likely to lead to continued tensions and possibly even conflict. Or will China undertake a more active leadership role from within the current architecture of norms, institutions, and international law and seek to develop win-win solutions to problems of overlapping interests? Whether the end of the twenty-first century sees a strong United States or a strong China, or a strong United States *and* a strong China, a regional partnership to address nontraditional security concerns will have been a win-win approach, accommodating the dynamics of mutual interests among the inevitable tensions of international relations.

The Three Disputes in the South China Sea have been sources of instability and even aggression for more than four decades. Only after the negative reaction to



the 1995 Mischief Reef incident and China's shift of policy toward regional integration and joint resource development was there a period of relative peace. Future peace and security in the South China Sea require all regional countries to remain focused on mutual interests rather than on the pursuit of national interests alone. This mutuality should include a renewed commitment to political, economic, and commercial integration and joint development of living and non-living maritime resources, which form a common Asian heritage. Nonregional states with regional interests, including the United States, can provide meaningful assistance and support in these endeavors.

Achieving a lasting situation of regional stability will require new approaches. The current pursuits of sovereignty, jurisdiction, and control are by nature win-lose. Power alone may produce settlements, but such settlements may not be final, because they do not account for the long-standing mutual interests of others. New, win-win forms of problem solving are needed today—forms marked by shared rather than exclusive authority and mutual rather than nationalistic interests. Only such approaches will ensure that the twenty-first century does not mirror the rivalry and conflict that dominated the twentieth.

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